



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

EPA Region 5 Records Ctr.



216808

SEP 07 2004

**VIA FACSIMILE**  
**AND CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

REPLY TO THE ATTENTION OF

C-14J

Mr. Glen W. Ekberg  
c/o: James Hess, Esq.  
10989 Shaw Road  
Rockford, IL 61114-6815

Re: Southeast Rockford Groundwater Contamination Superfund Site,  
Source Area 7, Rockford, Winnebago County, IL  
Notice of Noncompliance with April 21, 2004  
United States Environmental Protection Agency  
Unilateral Administrative Order #***V-W-04-C-786***

Dear Mr. Hess:

We have received a copy of your client's letter to Illinois Environmental Protection Agency (IEPA) in which Mr. Ekberg rescinds an agreement that he entered into at a meeting on April 28, 2004, at the United States Environmental Protection Agency ("U.S. EPA") offices in Chicago to discuss the Unilateral Administrative Order ("UAO") #V-W-04-C-786 issued by EPA on April 21, 2004. While this agreement is separate from the UAO, Mr. Ekberg's attempt to now deny access under the UAO as a result of his recision of this agreement constitutes a failure to comply with the provisions (at Section V, Paragraph 21) of the UAO, which remains in effect pursuant to Section XI Paragraph 32. If Mr. Ekberg continues in this course of action, he may become subject to civil penalties of up to \$32,500 per violation per day. See, Section 106(b)(1) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9606(b)(1). Continued violation of the provisions of the UAO can also result in treble punitive damages against a Potentially Responsible Party ("PRP") for any cost incurred by U.S. EPA, as a result of the violation. See, Section 107(c)(3) of CERCLA, 42 U.S.C. §9607(c)(3).

The action of rescinding the access agreement with the State of Illinois is impeding the overall progress of the response actions at the Site, and at Area 7 in particular. U.S. EPA has determined that Mr. Ekberg is in noncompliance with the Order, and may face enforcement sanctions under CERCLA.

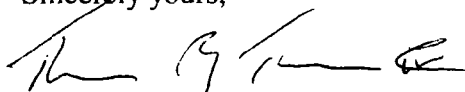
In case you are unfamiliar with the case law, federal courts have clearly settled the premise that CERCLA Section 104 is directly enforceable as a penalty provision in cases of PRP noncompliance. In U.S. v. George Trucking Co., 823 F.2d 685 (1<sup>st</sup> Cir. 1987), the court held that a combined CERCLA and Resource Conservation and Recovery Act case for penalties as a result

of PRP noncompliance with access for information orders was properly brought after U.S. EPA had exhausted its administrative actions, and that penalties of \$20,000 per PRP for "intransigent failure to reply" were in order. Id., 823 F.2d at 687. Further, courts have held that where U.S. EPA demonstrates a "reasonable basis" for believing that there has been a release or there exists a threat of release of hazardous substances into the environment, then the use of CERCLA 104(e)(5)(B) access authority (and its potential penalty provisions) is acceptable and will be upheld on review. See, Dickerson v. Administrator, Environmental Protection Agency, 834 F.2d 974, at 976-977 (11th Cir. 1987). Finally, the Seventh Circuit has upheld U.S. EPA's exercise of its CERCLA Section 104 authority in seeking access, especially when it maintains justification based on a number of factors including the prior inclusion of Site on the National Priorities List (NPL) at 42 U.S.C. Part 300, B. This factor, coupled with the prior findings of hazardous substances during a U.S. EPA inspection, were sufficient for the court to uphold application of U.S. EPA's Section 104 access authority. See, U.S. v. Fisher, 864 F.2d 434, at 437 (7<sup>th</sup> Cir. 1988). In this case, not only is Mr. Ekberg's portion of Area 7 completely within the scope of the Southeast Rockford Groundwater Contamination Superfund Site that has been placed on the NPL; but that the specific and uncontested June 2002 Record of Decision (ROD) for the Site has indicated repeated and consistent findings of hazardous substances at the Site.

U.S. EPA hereby requests that Mr. Ekberg assess his position and take any and all reasonable steps to achieve compliance with provisions of the UAO. Please advise me in writing as soon as possible after receipt of this letter concerning your client's position in this matter and anticipated response, but not later than September 10, 2004. Please be aware that failure to respond by the September 10, 2004 deadline will be treated as a denial.

Please feel free to contact me with any questions or concerns at 312/886-6613.

Sincerely yours,



Thomas Turner  
Associate Regional Counsel

Enclosure - UAO, April 21, 2004

cc: / R. Hart, RPM (SR-6J)  
U.S. EPA-Region 5

M. Reed/F. Biros, Trial Attorneys  
U.S. DOJ

M. Mallory, AUSA  
U.S. DOJ

E. Wallace, Asst. IL AG  
Office of Illinois AG - Chicago, IL



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

2002

REPLY TO THE ATTENTION OF

**CERTIFIED MAIL and OVERNIGHT  
RETURN RECEIPT REQUESTED**

Mr. Glen W. Ekberg  
c/o: James E. Meason, Esq.  
113 W. Main Street  
Rockton, Illinois 61072

R-6J

Re: Order Directing Compliance With Request for Access  
Glen W. Ekberg-owned Portion of Source Area 7, Southeast Rockford Groundwater  
Contamination Superfund Site, Rockford, Winnebago County, Illinois

Dear Mr. Ekberg:

Enclosed please find a unilateral Administrative Order issued by the U.S. Environmental Protection Agency (U.S. EPA) under Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. Section 9604.

The Order requires you to notify U.S. EPA within 10 calendar days after the issuance date of the Order whether you will provide the access required by the Order.

Please note that the Order allows an opportunity for a conference if requested within 3 days after your receipt of the Order, or if no conference is requested, an opportunity to submit comments no later than 2 calendar days before the effective date of this Order.

If you have any questions regarding the Order, feel free to contact Thomas Turner, Associate Regional Counsel, at (312) 886-6613 or Russ Hart, Remedial Project Manager at (312) 886-4844.

Sincerely yours,

A handwritten signature in cursive script that reads "Richard C. Karl".

Richard C. Karl  
Acting Director, Superfund Division

Enclosure

cc: Gary King  
Division of Land Pollution Control  
Illinois Environmental Protection Agency  
1021 North Grand Avenue  
Springfield, Illinois 62702

In the Matter of:  
Source Area 7 - Property of Mr. Glen W. Ekberg,  
**SOUTHEAST ROCKFORD GROUNDWATER  
CONTAMINATION SUPERFUND SITE**  
Rockford, Winnebago County, Illinois  
  
Mr. Glen W. Ekberg,  
Respondent.  
  
Proceeding Under Section 104(e) of the  
Comprehensive Environmental Response,  
Compensation and Liability Act,  
42 U.S.C. § 9604(e).

**ADMINISTRATIVE ORDER  
IN AID OF ACCESS**  
  
EPA Docket No.  
  
**V-W- '04 -C-786**

1. This Administrative Order in Aid of Access ("Order") is issued to Mr. Glen W. Ekberg, Respondent, pursuant to the authority vested in the President of the United States by Section 104(e)(5) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9604(e)(5), and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR § 300.400(d). This authority was delegated to the Administrator of the United States Environmental Protection Agency ("EPA") on January 23, 1987, by Executive Order 12580, 52 Fed. Reg. 2923, delegated to the Regional Administrators of EPA on April 17, 1987, by EPA Delegation No. 14-6, and further delegated to the Director of the Superfund Division by Regional Delegation 14-6.

## II. STATEMENT OF PURPOSE

2. This Order requires Respondent to grant EPA and its authorized representatives, including the Illinois Environmental Protection Agency and its employees and authorized representatives, entry and access to the property described in Paragraph 3 below for the purpose of performing a Superfund Remedial Design and Remedial Action (RD/RA) pursuant to the requirements of the June 11, 2002 Record of Decision (ROD) in this matter. This Order further requires Respondent and/or any employees, agents or representatives of Respondent, to refrain from interfering with access to the Property by EPA, and its authorized representatives for the purposes set forth herein.

## III. FINDINGS OF FACT

3. The Respondent has owned the property at the Source Area 7 portion of the Site since 1964. Source Area 7 is essentially located within the following boundaries: the Illinois Central Gulf and Chicago Northwestern Railroad tracks on the north, Sandy Hollow Road on the south, Alpine Road on the east and Twentieth Street to the west. Source Area 7 is also bounded on the east and west by residential properties and on the west and south by a community park. The legal description of the Southeast Rockford Groundwater Contamination Superfund Site (the Site) Source Area 7 Portion owned by Mr. Glen W. Ekberg is as follows:

That part of the Northwest 1/4 of Section 5 in Township 43 North, Range 2 East of the Third Principal Meridian. Winnebago County, Illinois, lying Southerly of the Illinois Central Railroad right of way; excepting highways.

Also part of the East Half (1/2) of the South West Quarter (1/4) of said Section

Five (5), Township and Range aforesaid, described as follows, to wit: Beginning at the North East corner of said quarter (1/4) section; thence, South, along the East line of said quarter (1/4) section, twenty-two (22) rods; thence West, parallel with the North line of said quarter (1/4) section to the West line of the East Half (1/2) of the South West Quarter (1/4) of said Section Five (5); thence North along said West line, twenty-two (22) rods to the North line of said quarter (1/4) section; thence East along said North line to the place of beginning; excepting from the last described tract a lane two (2) rods in width across the North side thereof, as same is described in Warranty Deed from Adelia Barnum et al to Daniel H.

Barnum, dated April 1, 1871 and recorded in Book 89 of Deeds, page 496 in said Recorder's Office; excepting the rights granted to Central Illinois Electric and Gas Co., by instrument dated April 25, 1951 and recorded in Book 767 of Recorder's Records, page 16 in said Recorder's Office.

and also,

The North 2 rods of the Northeast Quarter of the Southwest Quarter of Section 5, Township 43 North, Range 2 East of the Third Principal Meridian, excepting therefrom that part thereof conveyed to the State of Illinois, for the use of the Department of Public Works and Buildings by Warranty Deed dated July 29, 1963 and recorded August 16, 1963 in Book 1406 on Page 61, in Winnebago County, Illinois.

The North Half (1/2) of the West Half (1/2) of the South West Quarter (1/4) of Section Five (5), Township Forty-three (43) North, Range Two (2) East of the



Third (3<sup>rd</sup>) Principal Meridian, excepting the rights of the Central Illinois Electric and Gas Co., over said premises as described in instrument dated April 19, 1951 and recorded in Book 757 of Recorder's Records on page 18 in the Recorder's Office of Winnebago County, Illinois.

Also the East thirty-three (33) feet in width of the South half ( $\frac{1}{2}$ ) of the West Half ( $\frac{1}{2}$ ) of the South West Quarter ( $\frac{1}{4}$ ) of said Section Five (5), township and range aforesaid; excepting the South three hundred (300) feet thereof conveyed by Harry W. Littlejohn and Myrtle I. Littlejohn, his wife, to Union Grange No. 511 by Warranty Deed dated April 16, 1949 and recorded in Book 655 of Recorder's Records on page 458 in said Recorder's Office. Also part of the West Half ( $\frac{1}{2}$ ) of the South West Quarter ( $\frac{1}{4}$ ) of said Section Five (5), township and range aforesaid bounded and described as follows, to wit: Beginning at a point in the North line of Sandy Hollow Road two hundred (200) feet West of the East line of said eighty (80) acre tract, and thirty-three (33) feet North of the South line of said section; thence North, parallel with the East line of the West Half ( $\frac{1}{2}$ ) of the South West Quarter ( $\frac{1}{4}$ ) of said section two hundred sixty-seven (267) feet; thence East, parallel with the South line of said section, one hundred sixty-seven (167) feet; thence North parallel with the East line of the West Half ( $\frac{1}{2}$ ) of the South West Quarter ( $\frac{1}{4}$ ) of said section, thirty-three (33) feet; thence West, parallel with the South line of said section, two hundred (200) feet; thence South parallel with the East line of the West half ( $\frac{1}{2}$ ) of the South West Quarter ( $\frac{1}{4}$ ) of said section three hundred (300) feet to the North line of Sandy Hollow Road, thence

East along said North line thirty-three (33) feet to the place of Beginning.

4. On March 31, 1989, the Site was listed on the CERCLA National Priorities List, 40 CFR Part 300, App. B, pursuant to Section 105(a)(8)(B) of CERCLA, 42 U.S.C. § 9605(a)(8)(B).

5. Source Area 7 of the Site has undergone sampling for soil, water and soil vapor components during the 1991-1994 Remedial Investigation (RI), and in June 2002 a 153-page ROD was issued by EPA and Illinois EPA containing results of the RI and subsequent Feasibility Study (FS), a Proposed Plan for RD/RA and a Responsiveness Summary. The ROD documents the presence of volatile organic compounds (VOCs), leachate materials, soil debris, polynuclear aromatic compounds, xylene, metals, pesticides and soil vapor at Source Area 7.

6. Historically, Source Area 7 was used as a gravel pit, and portions were also operated for agricultural purposes. Additionally, EPA has received reports of illegal dumping of waste materials on a regular basis, both in the past and the present, at Source Area 7. The geology of Source Area 7 correlates well with past reports (and aerial photodocumentation) of quarrying and land filling, and depths to groundwater vary throughout Source Area 7. Unconsolidated and bedrock aquifer zones allow for groundwater transport in a northwest direction. During subsequent RI sampling in 1995 and 2001, notable concentrations of 1,1,1-TCA (dichloroethane - 3.8 parts-per-million(ppm)), PCE (tetrachloroethene - 1.1ppm) and TCE (trichloroethene - 0.69ppm) were detected in soil gas. Source Area 7 soil sampling from the same time periods revealed elevated concentrations of ethylbenzene (31ppm), toluene(23ppm) and xylene (ETX - 210ppm), along with chlorinated VOCs. Further, the 1995 RI sampling of groundwater and surface water at Source Area 7 indicated concentrations of many of the above mentioned VOCs at levels of concern, as well as the possibility of Non-Aqueous Phase Liquid (NAPL), that is,

solvents or other chemicals of concern that exist within the water table to such a significant degree that they have not decomposed. Finally, EPA and Illinois EPA have documented that Source Area 7 continues to supply the contaminated groundwater plume that moves through the overall Site.

7. EPA and Illinois EPA have previously installed and maintained monitoring wells on the Source Area 7 property. Mr. Ekberg's current posture makes it impossible to access these wells and make use of them for required response activities.

8. To address the release or threatened release of hazardous substances at Source Area 7 of the Site, EPA (and Illinois EPA) are planning to conduct certain response actions. These actions, are for implementation of RD/RA determined in the June 2002 ROD, and include further sampling and monitoring of soil, soil vapor, surface- and groundwater, soil source control, leachate source control, air sparging and soil vapor extraction.


9. To perform the response actions described above, it will be necessary for employees, agents, contractors, and other representatives of EPA (and Illinois EPA) to immediately enter the Source Area 7 property owned or controlled by the Respondent referred to above. The activities for which entry is required include: Further sampling and monitoring of Source Area 7 soil, soil vapor and surface- and groundwater, construction of the designated Remedial Design and implementation of the designated Remedial Action, pursuant to the June 2002 ROD for the Site.

10. EPA estimates that the duration of the required entry and access will be approximately 2 years for on-Site activities and further monitoring of well samples for 15-25 years.

11. Despite requests from representatives of EPA (and Illinois EPA), the Respondent has refused to provide access for purposes of performing the response activities described above.

These requests include repeated telephone conversations with Respondent's counsel in 2003 and 2004, letters from EPA Associate Regional Counsel Thomas Turner in November 2002 and February 2004, letters from Illinois Sr. Assistant Attorney General Elizabeth Wallace in December 2003 and March 2004, as well as frequent informal communications from the United States Department of Justice trial counsel assigned to this case at court-ordered discovery sessions, status hearings and settlement conferences between 2002 and 2004.

12. EPA and its contractors have been ready to perform the sampling since the Fall of 2003, but have been prevented from so doing because of the Respondent's failure to grant access. This refusal increases the risk of release or continued release of hazardous substances from the Source Area 7 portion of the Site. The threat of continuing contamination through groundwater or soil vapor in the immediate vicinity of a local community park and personal residences continues unabated.



#### IV. Determinations

13. The Site is a "facility" within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

14. The Respondent, Mr. Glen W. Ekberg, is a "person" within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

15. All of the substances listed in paragraph 6 above are hazardous substances within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

16. The past and present disposal and migration of hazardous substances at or from Source Area 7 of the Site constitutes an actual "release" or a threat of such a release into the "environment" within the meaning of Sections 101(8) and 101(22) of CERCLA, 42 U.S.C. §§

9601(8) and (22), and thus a reasonable basis to believe that there may be a release or threat of release within the meaning of Section 104(e)(1) of CERCLA, 42 U.S.C. § 104(e)(1).

17. The property owned or controlled by the Respondent referred to in paragraph 3 above is a facility, place, or property:

- a. where hazardous substances may have been disposed of;
- b. from which hazardous substances have been or may have been released;
- c. where such release is or may continue to be threatened;
- d. where entry is needed to effectuate a response action,

within the meaning of Section 104(e)(3) of CERCLA, 42 U.S.C. § 9604(e)(3).

18. Entry to property owned or controlled by the Respondent by agents, contractors, or other representatives of the United States (and the State of Illinois) is for the purposes of taking a response action, and otherwise enforcing the provisions of CERCLA, within the meaning of Section 104(e)(1) of CERCLA, 42 U.S.C. § 9604(e)(1).

19. EPA's request for access to property owned by the Respondent has been denied.

#### V. ORDER

20. The Respondent shall provide EPA (and Illinois EPA), their officers, employees, agents, contractors, and other representatives, full and unrestricted access at all reasonable times to the Respondent's portion of Source Area 7 of the Site for the purpose of conducting response activities, including but not limited to performance of RD/RA activities, including sampling, monitoring, construction, and remediation activities pursuant to the June 2002 Superfund ROD. The Respondent shall not interfere with EPA's exercise of its access authorities pursuant to 42 U.S.C. § 9604(e)(3) and 40 C.F.R. § 300.400(d), and shall not interfere with or otherwise limit

any activity conducted at the Site pursuant to this Order by EPA, its officers, employees, agents, contractors, or other representatives. Any such interference shall be deemed a violation of this order.

21. Nothing herein limits or otherwise affects any right of entry held by the United States (or the State of Illinois) pursuant to applicable laws, regulations, or permits. This Order applies to and is binding upon Respondent and his agents, heirs, successors, and assigns.

22. In the event of any conveyance by Respondent, or Respondent's agents, heirs, successors and assigns, of an interest in any property which includes an access area, Respondent and Respondent's agents, heirs, successors and assigns shall convey the interest so as to insure continued access by EPA (and Illinois EPA) and/or their representatives for the purpose of carrying out the activities pursuant to this Order. Any such conveyance shall restrict the use of such property so that the use will not interfere with activities undertaken pursuant to this Order. Respondent, or Respondent's agents, heirs, successors and assigns shall notify EPA in writing at least thirty (30) days prior to the conveyance of any interest in property where an access area is located, and shall notify the other parties involved in the conveyance prior to the transfer, of the provisions of this Order.

## VI. ENFORCEMENT

23. Compliance with this Order shall be enforceable pursuant to Section 104(e)(5) of CERCLA, 42 U.S.C. § 9604(e)(5). Failure to comply may also permit a court to subject the Respondent to civil penalties of up to \$32,500 for each day of each violation, as provided in Sections 104(e)(5) of CERCLA, 42 U.S.C. § 9604(e)(5), and the Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg. 7121, 40 C.F.R. Part 19.4, and/or punitive damages in

an amount up to three times the amount of any costs incurred by the United States as a result of such failure, as provided in Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Nothing herein shall preclude EPA from taking such other actions as may be necessary to protect the public health or welfare or the environment and recovering the costs thereof.

#### VII. Opportunity to Confer

24. Within 3 days after receipt of this Order, Respondent may request a conference with EPA to be held no later than 2 days before the effective date of this Order on any matter pertinent to this Order, including its applicability, the factual findings and the determinations upon which it is based, the appropriateness of any actions the Respondent is ordered to take, or any other relevant and material issues or contentions which Respondent may have regarding this Order. This conference is not an adversarial proceeding and is not part of any proceeding to enforce or challenge this Order. The Respondent may appear in person or by an attorney or other representative at the conference. The Respondent may also submit written comments or statements of position on any matter pertinent to this Order no later than the time of the conference, or two days before the effective date of this Order if the Respondent does not request a conference. EPA will deem the Respondent to have waived his right to the conference or to submit written comments if he fails to request the conference or submit comments within the specified time period. Any request for a conference or written comments or statements should be submitted to: Tom Turner, Assoc. Regional Counsel, U.S. EPA, Office of Regional Counsel, Region 5, 77 W. Jackson Blvd., (mail code: C-14J), Chicago, Illinois 60604, Telephone: (312)886-6613.

### VIII. Administrative Record

25. EPA has established an Administrative Record which contains the documents that form the basis for the issuance of this Order. It is available for review by appointment on weekdays between the hours of 8:00 am and 5:00 pm at the EPA regional offices in Chicago, Illinois. To review the Administrative Record, please contact Tom Turner at (312)886-6613 to make an appointment. A copy of the Administrative Record is also available for viewing at the Waste Records Center (7<sup>th</sup> Floor) of the EPA Region 5 office, 77 W. Jackson Blvd., Chicago, Illinois 60604.

26. Nothing in this Order constitutes a waiver, bar, release, or satisfaction of or a defense to any cause of action which EPA has now or may have in the future against Respondent, or against any entity which is not a party to this Order.

27. Nothing in this Order shall affect in any manner the right of EPA to issue any other orders to or take any other administrative or civil action against Respondent or any other parties under CERCLA which relate to this Site or any other site.

28. Nothing in this Order constitutes a decision on preauthorization of funds under Section 111(a)(2) of CERCLA, 42 U.S.C. § 9611(a)(2).

### IX. Effective Date; Computation of Time

29. Because of the immediate need to conduct the activities described above, this Order is effective on the 10th calendar day following the date of issuance written below.

30. All times for performance of obligations under this Order shall be calculated from the effective date. For purposes of this Order, the term "day" shall mean a calendar day unless otherwise specified. When computing any period of time under this Order, if the last day would



fall on a Saturday, Sunday, or federal legal holiday, the period shall run until the next working day.

X. Notice of Intent to Comply

31. As of the effective date of this Order, Respondent shall notify EPA in writing whether the Respondent will comply with the terms of this Order. Respondent's failure to notify EPA of his unconditional intent to fully comply with this Order by the time the Order becomes effective shall be construed as a denial of EPA's request for access and shall constitute a violation of this Order by Respondent. Such written notice shall be sent to:

Tom Turner  
Office of Regional Counsel  
United States Environmental Protection Agency, Region 5  
77 W. Jackson Blvd., mail code: C-14J  
Chicago, Illinois 60604  
Telephone: (312)886-6613

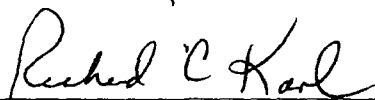
XI. Termination and Modification

32. This Order shall terminate when EPA so orders.

33. This Order may be amended or modified only by EPA in writing. Any such amendments or modifications shall be effective when signed by the Superfund Division Director or the Acting Regional Administrator.

SO ORDERED.

Date: 4-21-04

  
Richard C. Karl  
Acting Director, Superfund Division